IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 276 OF 2005

Durga Prasad R.Sharma. ... Appellant.

Versus.

The Municipal Corporation of
Greater Mumbai. ... Respondents.

Shri P.K.Dhakephalkar i/by M/s.Khilnani & Co.for the Appellant.

Shri Ms.Geeta Joglekar for the Respondents.

CORAM : ABHAY S. OKA, J.

DATED : 11th April, 2005.

P.C.:

1. Admit. The Respondents waive service. Heard the learned Counsel appearing for the parties.

2. Shri Dhakaphalkar the learned Counsel appearing for the Appellant has invited my attention to the findings recorded in paragraph 11 by the learned trial Judge. The learned trial Judge has recorded a primafacie finding that the Appellant/Plaintiff has demolished the old dilapidated structure and has re-erected the structure. The learned Counsel appearing for the Respondent has invited my attention to the photographs which are taken by an officer of the Corporation when the brick work was in progress. She has placed before me Photographs which were subsequently taken after the work was complete. The learned Counsel submits that these photographs if compared with the photographs annexed to the plaint show that there is reconstruction of the structure of the Appellant.

3. A perusal of the impugned Judgment and Order shows that there is no reference to these photographs which are produced before this Court by the learned Counsel for the Respondents. There is also no reference made to these photographs in the Written Statement. The learned Counsel for the Respondent has also referred to the inspection report which is not on record.

4. In my view the photographs which are produced before this Court are very relevant for consideration of the issue of prima-facie case. There is nothing on record to show that the said photographs were placed on record before the trial Court. As the consideration of the said photographs and the inspection report is necessary before coming to any conclusion regarding the existence of prima facie case, it is necessary to remand the Notice of Motion to the trial Court for a fresh hearing.

5. Hence the following order is passed:

(i) The impugned Judgment and order dated 11th February 2004 is quashed and set aside. Notice of Motion No.4140 iof 2003 is restored and is remanded to the trial Court for hearing afresh.

(ii) It will be open to the Respondents to

place on record the photographs and other relevant documents in support of their case along with affidavits. The Appellant will also be at liberty to produce additional documents and file further/additional affidavit.

(iii) The Notice of Motion will be decided by the learned trial Judge afresh after considering all the documents and evidence brought on record by the parties. The Notice of Motion will be decided as expeditiously as possible and in any event on or before 30th June 2005.

(iv) All contentions of the parties are expressly kept open.

(v) Till the disposal of the Notice of Motion both the parties will maintain status-quo in all respects in respect of the suit structure as of today.

(vi) The parties and the trial Court will act on an authenticated copy of this order.

Judge.